SUPREME COURT, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-842

LUTHER DALE BAKER,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES R. McATEE
Pensacola, Florida
Attorney for Petitioner

INDEX

Reference to Official Report ---------- 1

Grounds of Jurisdiction ---------- 2

Questions Presented for Review ------- 2

Constitutional Provisions and Statutes Involved ---------- 2-3

Statement of the Case ---------- 3-5

Reasons for Granting the Writ --------- 5-9

Conclusion ---------- 9

Appendix -- Opinion of the United States Court of Appeals for the Fifth Circuit ---------- A1

Certificate of Service ---------- B1

TABLE OF CASES

Carroll vs. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925) ---------- 8

Cotton vs. United States, 371 F.2d 385 (9th Circ. 1967) -------- 7

Pasterchik vs. United States, 400 F.2d 696 (9th Circ. 1968) -------- 7

Preston vs. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed. 2d 777 (1964) ---------- 6

Simpson vs. United States, 346 F.2d 291, rehearing denied en banc (10th Circ. 1965) ---------- 6

Terry vs. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968) -- 8

United States vs. Graham, 391 F.2d 439 (6th Circ. 1968) ------- 7

United States vs. Hopkins, 433 F.2d 1041 (5th Circ. 1970) ------ 7

United States vs. Johnson, 413 F.2d 1396 (5th Circ. 1969), aff'd en banc 431 F.2d 441 (5th Circ. 1970)- 6&7

United States vs. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932) ---------- 8

United States vs. Nikrasch, 367 F.2d 740 (7th Circ. 1966) -------- 6

United States vs. Pearson and Johnson, 448 F.2d 1207 (5th Circ. 1971) ---------- 7

United States vs. Polk, 433 F.2d 644 (5th Circ. 1970) ---------- 7

United States vs. Powers, 439 F.2d 373 (4th Circ. 1971)---------- 7

United States vs. Williams, 434 F.2d 681 (5th Circ. 1970) ------- 7

Warren, Maryland Penitentiary vs. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed. 782 (1967) ---------- 8

INDEX

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourth Amendment, Constitution of the United States ---------- 3

18 U.S.C. 3772 ---------- 2

28 U.S.C. 1254 (1) ---------- 2

Code of United States Title 18 2313 ---------- 3

Rules 11 and 22 (2) of the Rules of Practice and Procedure of the Supreme Court of the United States ---------- 2

IN THE

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OCTOBER TERM, 1971

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LUTHER DALE BAKER,
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-vs-

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in _____ F.2d _____. A copy of the official opinion in this case is appended hereto as Appendix A.

(b)

GROUNDS OF JURISDICTION

The decision and opinion sought to be reviewed is that rendered in the case of Luther Dale Baker vs. United States of America, Case Number 71-1351, and is dated November 30, 1971.

The jurisdiction of this Court is invoked under 28 UNITED STATES CODE § 1254 (1), and under and by virtue of Title 18 U.S.C. § 3772, within the time provided for in Rule 11 and Rule 22 (2) of the RULES OF PRACTICE AND PROCEDURE OF THE SUPREME COURT OF THE UNITED STATES.

(c)

QUESTION PRESENTED FOR REVIEW

Where there is a forceful opening of a truck door and subsequent taking of the Vehicle Identification Number (VIN) from the post of the door, either without a search or arrest warrant, is this a search of the vehicle within the contemplation of the Fourth Amendment to which constitutional standards must be applied?

(d)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portion of the Fourth Amendment to the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

Title 18 § 2313, United States Code provides that:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

On August 4, 1969, a 1969 Ford one-half ton pickup truck was stolen from the Ford dealership in Foley, Alabama. The truck was then delivered to Clarence W. Messick in Pensacola, Florida. Petitioner had, on occasions, asked Messick to obtain for him a pickup truck, since his 1966 Ford Fairlane had been stolen, which theft was reported to the Sheriff of Escambia County, Florida. The sale was completed on November 8, 1969 and Petitioner bought the 1969 Ford pickup from Messick for the sum of $500.00 cash, but no title papers were transferred during the transaction.

Agent William O. Landsgaard of the FBI had been notified by Alabama officials that Petitioner's 1966 automobile had been found in Alabama. On a routine investigation, Agent Landsgaard contacted Petitioner and requested an immediate appointment to discuss the circumstances of the theft of the 1966 Ford automobile. Petitioner, after indicating to the Agent that he had an appointment, then agreed to see the Agent within the hour. Prior to the arrival of Agent Landsgaard, Petitioner drove the 1969 Ford half-ton pickup to the parking lot of Barnes Supermarket and parked the truck in the parking lot, then locked the truck. His girlfriend, Tina Lynch, followed him there and then drove Petitioner back to the trailer park. The agents, upon entering the trailer park for their appointed interview with Petitioner, saw Tina Lynch leaving the trailer park. Later that day, Agent Landsgaard interviewed Petitioner's former wife and ascertained that Petitioner was driving a white Ford pickup truck. Mrs. Baker informed Agent Landsgaard that Petitioner had a girlfriend by the name of Tina Lynch. Tina Lynch was interviewed, and she informed Agent Landsgaard that Petitioner had parked the truck in the shopping center lot.

Agent Landsgaard had been making routine investigations in this area of Pensacola. Once Agent Landsgaard had come upon this particular truck, he determined that the truck was registered to a Eugene Odom. Agent Landsgaard, without the benefit of an arrest warrant or search warrant then took his penknife and opened the truck door by slipping the penknife through the vent window. After the door was opened, the VIN was taken off the door post, and it was determined that the truck was stolen. It was admitted by Agent Landsgaard

that he did not know the truck was stolen and only had suspicion that the truck might have been stolen.

The Fifth Circuit Court of Appeals found that the fact showed that there was probable cause for the search of the truck. This was in direct disagreement to the finding of the trial Court which found that there was no particular reason to believe that this vehicle was stolen, and therefore no probable cause for the search. Petitioner was not arrested after the search, but was arrested approximately seven (7) months after the vehicle had been searched by Agent Landsgaard. The Court of Appeals did not find that the procedure used by Agent Landsgaard was a search, but the Court did find probable cause for the methods used by Agent Landsgaard in obtaining the VIN number from the door post.

REASONS FOR GRANTING THE WRIT

This case comes to this Court on a Petition for Writ of Certiorari amidst conflicting rulings on numerous Courts of Appeal in their interpretation and application of decisions of this Court relating to warrantless searches of motor vehicles. The Courts of Appeal who have considered this problem have in their opinions admitted the obvious conflict in their refusal to apply rulings of the other District Courts of Appeal. According to my research, this case is the first opportunity this Court has had to resolve the conflict concerning the applicable law of the warrantless taking of VIN numbers from motor vehicles without either a search or arrest warrant.

In order to present this matter to the Court as briefly and concisely as possible, the Petitioner has

made a simple analysis of the cases from the District Court. It is found that the various rulings of the District Court fall into two categories, keeping in mind as a general rule in each case the VIN number was obtained from the door post of a motor vehicle by an officer or agent without a search warrant. After obtaining the VIN number, the officer or agent determined that the vehicle had been stolen. The categories established by the Petitioner are not in themselves indicative of the nature and facts of each case, but are used as a shorthand method to summarily present the various rulings of the Courts of Appeal.

The general rule followed by two Courts of Appeal is that the obtaining of the VIN number by an officer after the opening of the door without a warrant constitutes a search within the meaning of the Fourth Amendment. These Courts have relied upon Preston vs. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964) as the authority that the search was not made incident to a lawful arrest, therefore the obtaining of the VIN number and subsequent finding that the vehicle was stolen was an unlawful search and seizure, Simpson vs. United States, 346 F.2d 291, rehearing denied en banc (10th Circ. 1965), and United States vs. Nikrasch, 367 F.2d 740 (7th Circ. 1966), see also United States vs. Johnson, 413 F.2d 1396 (5th Circ. 1969) aff'd en banc 431 F.2d 441 (5th Circ. 1970).

The majority rule established by four Courts of Appeal have adopted a somewhat novel approach to the problem. Each of these Courts allowed into evidence the results of the obtaining of the VIN number from a vehicle without a search warrant. The allowance into evidence of the results is based upon a theory that

it was an inspection of the number which was reasonable or alternatively that the search might be reasonable, or that the accused lacked the standing to object to the taking of the number, United States vs. Pearson and Johnson, 448 F.2d 1207 (5th Circ. 1971); Cotton vs. United States, 371 F.2d 385 (9th Circ. 1967); Pasterchik vs. United States, 400 F.2d 696 (9th Circ. 1968); United States vs. Graham, 391 F.2d 439 (6th Circ. 1968); United States vs. Hopkins, 433 F.2d 1041 (5th Circ. 1970); United States vs. Powers, 439 F.2d 373 (4th Circ. 1971); United States vs. Johnson, 413 F.2d 1396 (5th Cir 1969) aff'd en banc 431 F.2d 441 (5th Circ. 1970); United States vs. Polk, 433 F.2d 644 (5th Circ. 1970); United States vs. Williams, 434 F.2d 681 (5th Circ. 1970).

The opinion in Simpson vs. United States has been specifically rejected by the majority of the Courts of Appeal in their opinions on the particular case presented to them. This is true even though the particular case before them would present a factual situation where the taking of the VIN number was some distance from the place of arrest, therefore these Courts have rejected this Court's ruling in the Preston case. Some of the Courts in the majority find that the taking of the number is not a search within the confines of the Fourth Amendment, but they justify their position that the taking of the number is a reasonable inspection. Their reasoning being that owners or occupants of a vehicle have no right to expect privacy of the VIN number located on the door post of their vehicle.

With the background presented thus far, and the status of the law in this confused area as such, the case before this Court presents an even stronger

showing of the violation of the Fourth Amendment by the FBI Agent. This is the first case in the line of cases cited where a forceful entry into the vehicle was accomplished without either a search or arrest warrant, and the Petitioner was not arrested until approximately seven (7) months after the obtaining of the VIN number from the vehicle.

The Fifth Circuit Court of Appeals has adopted the reasoning of the Tenth Circuit in Cotton vs. United States. In adopting that reasoning, the Court fails to recognize that the taking of the VIN number is a search. The Fifth Circuit has given an officer the unbridled right to inspect vehicles upon suspicion in order to determine whether or not a vehicle is stolen which conflicts with this Court's opinion in Carroll vs. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). This is a classic example of an exploratory search by an officer to obtain evidence of a crime which has been condemned by this Court, United States vs. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932).

The Fourth Amendment protects people against arbitrary intrusions into the privacy of their life, such has occurred here when the Agent forcefully opened the truck door, Warren, Maryland Penitentiary vs. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed. 782 (1967). The majority of the Courts have established a new rule of law allowing an officer to "stop and frisk" a vehicle to determine if the vehicle has been stolen. This is what this Court condemned in Terry vs. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968).

The question presented to this Court has given the numerous Courts of Appeal who have considered the question a difficult problem, one of which there is no uniformity in their decisions. The numerous problems which have arisen in the decisions of the Court have best been pointed out by Judge Godbold in his dissent in the en banc affirmance of United States vs. Johnson. Judge Godbold, with a scholarly analysis of the problem, has presented numerous constitutional problems which have arisen because of the Fifth Circuit en banc opinion.

CONCLUSION

For the reasons that the various Courts of Appeal are in conflict as to the applicable rulings of this Court which should govern the right of an officer to remove the VIN number from the vehicle without a search warrant, and because of the Fourth Amendment question which has not been answered by this Court, it is respectfully submitted that this Petition for Writ of Certiorari should be granted and that this Court should determine that the Court below erred in the respects herein urged.

Respectfully submitted;

JAMES R. McATEE
Attorney for Petitioner

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1351
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LUTHER DALE BAKER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

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(November 30, 1971)

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

WISDOM, Circuit Judge: This case turns on the admissibility of evidence disclosing the VIN (vehicle identification number)[1] when a Government agent used

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]The vehicle identification number appears on a removable plate, usually attached to the front left door post of a vehicle. The plate contains digits designating the manufacturer, model, year, and serial number of the vehicle.

APPENDIX

a penknife to open the door of a truck to find the VIN. We affirm the judgment below.

During the night of August 4, 1969, a 1969, white Ford one-half ton pickup truck was stolen from Moyer Ford Sales in Foley, Alabama. The truck was immediately delivered to Clarence W. Messick in Pensacola, Florida. There is evidence that Messick knew that the truck was stolen. Dale Luther Baker, appellant in this Court, asked Messick to secure for him a 1970 truck. Baker had recently had his 1966 Ford Fairlane stolen, according to a report he filed with the Escambia County, Florida, Sheriff's Office. On November 8, 1969, Baker bought the stolen 1969 Ford pickup truck from Messick for $500 cash but received no papers or documents of title.

On March 6, 1970, a local F.B.I. agent received a report that Baker's 1966 Ford Fairlane which had previously been reported stolen had been recovered in Alabama. The agent verified the theft report with the County Sheriff's Office and obtained Baker's address and telephone number. The F.B.I. agent telephoned Baker to request an interview with him; it was routine procedure for the F.B.I. to talk with the owner-victim of a stolen vehicle upon its recovery. Baker was reluctant to talk with the agent and asked that the interview be put off until the following day. Finally, Baker agreed to meet with the agent later that same day.

After interviewing Baker, F.B.I. Agent Landsgaard talked with Baker's ex-wife and learned that Baker had been driving a pickup truck. Landsgaard also spoke

with Tina Lynch, Baker's girl-friend, who revealed the following events which had occurred earlier that day. Miss Lynch had received a call from Baker telling her that he was coming to see her. When Baker arrived, he told her that someone was coming to see him and that he did not want that person to see his truck. At Baker's request, the girl followed Baker to Barnes Supermarket. He parked the truck, and she drove him back home. Baker told her that if anyone asked where she had taken him she was to say she had taken him to see his children.

Agent Landsgaard, who had been looking for several stolen trucks of the same type, went to Barnes Supermarket. After locating the truck in the parking lot, Landsgaard checked the license number with the County Sheriff's Office and learned that it was registered to a Eugene Odom of Brewton, Alabama. The truck was locked, but, by inserting his pen-knife in the vent-window of the truck, Landsgaard was able to open the door and obtain the vehicle identification number.[1] A check of the vehicle identification number with the National Crime Information Center in Washington, D.C. revealed that the truck had been stolen.

Baker was indicted for receiving and concealing a motor vehicle, knowing it to have been stolen, in violation of 18 U.S.C. §2313. A jury found him guilty as charged, and he was sentenced to 18 months imprisonment.

Baker contends, first, that Agent Landsgaard's act of opening the locked truck and viewing the vehicle

identification number constituted an unreasonable search and seizure in violation of his Fourth and Fourteenth Amendment rights. As a result, he argues, the district court erred in failing to grant his motion to suppress the evidence gained from that search.

This Court, within the context of the Fourth Amendment, has frequently had before it the problem of vehicle identification number checks. *United States v. Johnson*, 5 Cir. 1969, 413 F.2d 1396, aff'd en banc, 431 F.2d 441 (1970); *United States v. Polk*, 5 Cir. 1970, 433 F.2d 644; *United States v. Williams*, 5 Cir. 1970, 434 F.2d 681; *United States v. Pearson & Johnson*, 5 Cir. 1971, F.2d [Nos. 29,260 and 29,454, Sept. 21, 1971]. In *United States v. Johnson, supra*, this Court sitting en banc ruled:

> [I]nspections of motor vehicles performed by police officers, who were entitled to be on the property where the vehicles were located, which in no way damaged the vehicles and were limited to determining the correct identification numbers thereof were not searches within the meaning of the Fourth Amendment; and that alternatively, if either of such inspections constituted a Fourth Amendment search, then no search warrant was necessary because such inspections were reasonable and did not violate the right of the people to be secure in their persons, houses, papers or effects.

431 F.2d at 441. *See also United States v. Graham*,

6 Cir. 1968, 391 F.2d 439; *Cotton v. United States*, 9 Cir. 1967, 371 F.2d 385; *contra Simpson v. United States*, 10 Cir. 1965, 346 F.2d 291. The cases have, however, explicitly avoided passing on the Fourth Amendment status of a vehicle identification number check of a locked vehicle. *See United States v. Johnson*, 5 Cir. 1970, 431 F.2d 441; *United States v. Polk*, 5 Cir. 1970, 433 F.2d 644, 646; *Cotton v United States*, 9 Cir. 1967, 371 F.2d 385, 394. The instant appeal presents that issue. Agent Landsgaard was able to check the vehicle identification number only after opening the locked truck through prying open the vent window with a penknife and opening the door. Baker argues that, unlike the previous cases where the check of a vehicle identification number of unlocked vehicles was held not to be a "search" protected by the Fourth Amendment, this forced opening of his locked truck must surely constitute a "search". The government, on the other hand, contends that, since the agent could open an unlocked door to check the vehicle identification number he could open the locked door. This act, the government argues, was a minor departure for the identification procedure approved in *Johnson* and *Polk* and is not a "search".

We find it unnecessary to define the outer limits of the *Johnson* procedure in this case, for, assuming, but not deciding, that the check of the vehicle identification number of a locked vehicle constitutes a "search" protected by the Fourth Amendment, this search was not conducted in violation of the Fourth Amendment. We hold that the procedure involved in this case, even assuming it to be a search, was based on probable cause,

and, therefore, was legal. Agent Landsgaard became suspicious when Baker was reluctant to be interviewed about the return of his stolen automobile. The agent had been searching for stolen pickup trucks for several weeks. Landsgaard's conversation with Baker's girlfriend revealed Baker's attempt to conceal a pickup truck from the agent. Finally, a check of the license number on the truck revealed that the plates were registered to someone other than Baker. These facts gave Agent Landsgaard reliable information that the vehicle had been stolen and probable cause to enter the vehicle for the limited purpose of checking the vehicle identification number in order to identify the vehicle. *See United States v. Johnson*, 5 Cir. 1969, 413 F.2d 1396, 1400; *United States v. Johnson*, 5 Cir. 1970, 431 F.2d 441; *United States v. Williams*, 5 Cir. 1970, 434 F.2d 681, 683-84. The motion to suppress was properly denied.

Next, Baker contends that the trial court erred in denying his motion for judgment of acquittal based upon the fact that the vehicle in question had lost its interstate characteristic by the time Baker purchased it. An essential element of the offense proscribed by 18 U.S.C. §2313 is that the stolen vehicle be in interstate commerce. However, as we noted in *Powell v. United States*, 5 Cir. 1969, 410 F.2d 710, 712, the question "whether or not stolen property is in interstate commerce, or has come to rest within a state and lost its interstate character is one of fact for the jury." Taking the view most favorable to the government, *Glasser v. United States*, 1941, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, there was substantial evidence from

which the jury might conclude that the truck retained its interstate character. Immediately after it was stolen the truck was delivered to Messick in Pensacola, Florida. Thereafter, until the sale to Baker, the truck was at all times in the possession of Messick, a known dealer in stolen vehicles. Despite Messick's personal use of the truck, he revealed no intention of keeping it but prepared it for sale by replacing the license plates and affixing a Florida inspection sticker. When Baker purchased the truck, he was given no papers or other documents of title. Admittedly, Messick had the vehicle in his possession for three months. Time, however, is not conclusive but rather one of the factors to be considered in determining whether a vehicle is in interstate commerce. We cannot say, as a matter of law, that the vehicle in this case lost its interstate character. The question was for the jury, and there was substantial evidence from which the jury could conclude that the pickup truck was still in interstate commerce. *See Powell v. United States*, 5 Cir. 1969, 410 F.2d 710.

Finally, Baker argues that the admission of certain evidence was improper, prejudicial, and should result in reversal. Specifically, he objects to the admission of testimonial and documentary evidence about the theft of the 1966 Ford Fairlane owned by Baker. He feels that the presentation of the evidence by the government was an attempt to show that he was engaged in a scheme or artifice over the theft of the vehicle. Further, Baker urges that Messick's exercise of his privilege against self-incrimination when questioned about the theft was highly prejudicial. In short, Baker

feels that the evidence concerning the theft was immaterial and prejudicial. We cannot agree. The evidence was material in at least two respects. First, the evidence about the theft of the vehicle laid the foundation for the telephone call to Baker by Agent Landsgaard about the recovery of the vehicle. Baker's reluctance to talk about the return of his stolen car in the face of news which would usually be happily received made Landsgaard suspicious, led to further investigation, and furnished some of the probable cause for the later search. Baker's reaction was also a factor which the jury might consider on the issue of substantive guilt. Second, the evidence about the theft of the 1966 Ford Fairlane was a circumstance which the jury could consider to show that Baker needed a means of transportation when he allegedly bought the truck from Messick. We believe the evidence was material, not overly prejudicial, and properly admitted.

The judgment is AFFIRMED.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing Petition of Luther Dale Baker were deposited in the United States Post Office with first-class postage prepaid, addressed to the Solicitor General of the United States, Department of Justice, Washington 25, D. C., 20530; and to Honorable William H. Stafford, Jr., United States Attorney, Post Office Building, Pensacola, Florida, by delivery.

This the 27th day of December, 1971.

JAMES R. McATEE
Counsel for Petitioner

28 West Government Street
Pensacola, Florida 32501